In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 319

ESTATE OF RICHARD C. DUPONT, DECEASED,
WILMINGTON TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 3a–17a) are reported at 18 T. C. 1134. The opinion of the Court of Appeals is reported at 233 F. 2d 210.[1]

---

[1] The record filed herein by taxpayer, pursuant to this Court's Rule 21, consists of copies of the respective appendices to the taxpayer's brief and the Government's brief in the Court of Appeals, and of proceedings of the Court of Appeals. Record references herein are to the pages of the appendix of taxpayer's brief, as printed and filed in the Court of Appeals. References to the opinion of the Court of Appeals are to the pages of the slip opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1956. The petition for a writ of certiorari was filed on August 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the estate of a person killed during the war, while flying as special civilian assistant to the Commanding General of the Army Air Forces, is exempted from certain estate taxes by Section 939 of the Internal Revenue Code of 1939, which applies only to the estates of members of the military or naval forces of the United States on active service.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 939. CERTAIN MEMBERS OF ARMED FORCES.
>
> (a) [As added by Section 10 (a), Act of October 25, 1949, c. 720, 63 Stat. 891, 896–897 (the so-called Technical Changes Act of 1949), and as amended by Section 606, Revenue Act of 1951, c. 521, 65 Stat. 452] (a) *Deaths After December 6, 1941, and Before January 1, 1947.*—The tax imposed by section 935 shall not apply to the transfer of the net estate of a citizen or resident of the United States dying on or after December 7, 1941, and before January 1, 1947, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations if such decedent—
>
> (1) was killed in action; or

(2) died as a result of wounds or other injuries, or of disease, suffered while in line of duty by reason of a hazard to which he was subjected as an incident of military or naval service.

* * * * *

(26 U. S. C. 939.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

Sec. 81.2 [as amended by T. D. 5699, 1949–1 Cum. Bull. 181, and T. D. 5834, 1951–1 Cum. Bull. 72, T. D. 5941, 1952–2 Cum. Bull. 234]. Description of Tax.—

* * * * *

A person was in active service as a member of the forces described in section 939 (a) or (b) if he was at the time of his death actually serving in such forces, not necessarily in the field or in the theater of war. Personnel in the inactive reserves or on retirement are not in active service. Periods during which a person is absent from duty on account of sickness, wounds, leave, internment by the enemy, or other lawful cause are periods of active service. * * *

For the purposes of this section, the term "military or naval forces of the United States" and the term "Armed Forces of the United States" each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force. The terms also include the Coast

President Roosevelt awarded the Distinguished Service Medal posthumously to the decedent for exceptionally meritorious and distinguished service, exceptional professional ability and inspiring leadership in planning and supervising the effective use of military gliders, directing their exploitation for airborne operations, effecting important changes in training techniques, and otherwise contributing materially to the successful accomplishment of a mission of the greatest importance to the war effort. (R. 10a.)

ARGUMENT

1. There is here under attack the ruling of the lower courts that the facts of the present case fail to meet the requirements of a tax exemption statute. The statute in question, Section 939 (a) of the Internal Revenue Code of 1939, *supra*, p. 2, provides in pertinent part that the additional estate tax imposed by Section 935—

> shall not apply to the transfer of the net estate of a citizen or resident of the United States dying * * * while in active service as a member of the military or naval forces of the United States * * *.

The lower courts concluded that the decedent was not, at the time of his death, "in active service as a member of the military * * * forces of the United States" within the meaning of the statute; and hence that his estate is not exempted from the additional estate tax.

Giving to the language of the statute its plain, ordinary and usual meaning—and no authority for a different construction is suggested—it is evident that the ruling of the lower courts is correct. The exemption allowed by Section 939 is expressly limited to *members* of the military or naval forces in active service. Civilian employees of the Government are not, in the ordinary and usual sense, members of the armed forces on active duty.[2]

In the case at bar, decedent was never liable to do duty in the field as a combatant; nor did he become a commissioned officer, a warrant officer, or a member of the enlisted personnel in the military service. His appointment as special assistant to General Arnold expressly designated him "to serve in a civilian capacity." (R. 7a.) He filed the standard application form for employment of civilians by the Government; took the oath of office of a civilian employee; and received his travel orders and his pay as a civilian employee, from the civilian personnel division of the

---

[2] It is said in *Wilmington Trust Co.* v. *Mutual Life Ins. Co.*, 76 F. Supp. 560, 563–564 (Del.), affirmed, 177 F. 2d 404, certiorari denied, 339 U. S. 931:

"But the cases which have been decided in the past are to the effect that one is not in the military service until he has passed the necessary examinations, enrolled as a soldier or has been commissioned as an officer and become subject to military discipline and orders. *Welts* v. *Connecticut Mutual Life Ins. Co.*, 48 N. Y. 34, 8 Am. Rep. 518; *New York Life Ins. Co.* v. *Hendren*, 24 Grat., Va., 536; *Redd* v. *American-Central Life Ins. Co.*, 200 Mo. App. 383, 207 S. W. 74; *Ruddock* v. *Detroit Life Ins. Co.*, 209 Mich. 638, 177 N. W. 242; *Jorgensen* v. *Metropolitan Life Ins. Co.*, 44 A. 2d 907, 24 N. J. Misc. 22; *Bending* v. *Metropolitan Life Ins. Co.*, 74 Ohio App. 182, 58 N. E. 2d 71."

The last case invoked by taxpayer is *Soriano* v. *United States,* decided by the Court of Claims on December 16, 1955, certiorari granted, 351 U. S. 917. But here again—as in the *Connelly* and *Cohen* cases—the Court is not called upon to explore the broader meanings of "military service," or "member of the military or naval forces," but is faced with a much narrower issue; hence its issuance of the writ has no relevance to the case at bar. *Soriano* is one of a group of suits against the United States by plaintiffs who claim reimbursement for having furnished foodstuffs and other supplies to guerrilla units operating in the hills of the Philippines during the Japanese occupation. The question before this Court is whether the Philippine guerrillas were members of the armed forces of the United States, as well as of the Commonwealth of the Philippines, an issue which has no relevance here. It is undisputed in that case that the guerrillas were performing military service as combatants in uniform, subject to military discipline; and it is undisputed that they were members of regularly constituted armed forces. But such membership is precisely the matter at issue in the case at bar; and it is irrelevant to this issue whether the armed forces of which the guerrillas were members should be attributed to one sovereign power or to two.

We submit, therefore, that the decisions invoked by taxpayer are irrelevant to the issue raised herein; and that the lower courts correctly held that decedent was not a member of the military or naval forces of the United States at the time of his death. If any-

thing, the cases relied upon by taxpayer militate against its position; and the decision herein, as the Court of Appeals points out (Slip Op. 3), derives further support from *United States* v. *Popham,* 198 F. 2d 660 (C. A. 8th).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HILBERT P. ZARKY,
GRANT W. WIPRUD,
Attorneys.

SEPTEMBER, 1956.

U. S. GOVERNMENT PRINTING OFFICE 1956

Guard. The members of such forces include commissioned officers and the personnel below the grade of commissioned officer in such forces. However, the exemption is not allowed to the estate of a decedent whose only military status was of a limited character, such as that of a member of the Army Specialist Corps or of certain temporary members of the Coast Guard Reserve. For the purposes of this section the term "member of the military or naval forces * * * of any of the other United Nations" includes any decedent whose duties and status in the service of any of the United Nations other than the United States corresponded to those of any member of the military or naval forces of the United States as defined in this section.

* * * * *

STATEMENT

The material facts, as found by the Tax Court (R. 4a–10a), may be summarized as follows:

During his lifetime, the decedent was an expert glider pilot and a manufacturer of glider aircraft. His experience and knowledge in the glider field resulted in his appointment in April, 1943, as special assistant to the Commanding General of the Army Air Forces, in charge of the Army's program for air transport of troops and cargo by gliders. The appointment was preceded by a letter from decedent to General H. H. Arnold (then commanding the Army Air Forces) suggesting that—

> In order to accomplish results in a minimum of time, authority necessary to short cut usual lines seem to indicate that I would be most effective if appointed as a Special Civilian Assistant on your staff, with no military rank * * *.

In appointing decedent as special assistant, General Arnold designated him "to serve in a civilian capacity;" gave decedent " * * * with respect to the glider program the authority of an Assistant Chief of Air Staff;" directed decedent to report to him through the Chief of Air Staff; and authorized him to deal directly with the Assistant Chief of Air Staff and with the commanding generals of the various Air Forces. A directive issued concurrently with decedent's appointment "* * * created within Headquarters, Army Air Forces, the office of Special Assistant on the Army Air Forces Glider Program." (R. 6a–7a.)

General Arnold later wrote with respect to decedent's appointment, and if living would testify, as follows (R. 7a):

> * * * That clause,—"to serve in a civilian capacity"—, was inserted, in his case, primarily to expedite the program for which he, because of his special qualifications, had been made responsible, and because of the urgent relation of that program to the effectiveness of United States Army Air Forces combat operations. In civilian clothes, Mr. du Pont was automatically relieved of the necessity of channeling his

activities through numerous subordinate military offices: as a civilian he could deal *direct* with the Office of the Commanding General, Army Air Forces. This meant an invaluable saving of time; and time, at that period, was crucially "of the essence". In this sense, then, his being in civilian clothes was truly a military expedient. Factually, he was as much a member of our military establishment as though he held a commission. He gave his life in military service as actually as any officer in uniform, in actual military combat.

As special assistant decedent's duties and functions were, *inter alia*, to determine tactics and techniques with respect to the use of gliders and related equipment; determine policies, programs and standards for training individuals and units; determine and approve military characteristics of materials used primarily in the glider program; determine policies, plans and programs for research, developmental engineering, procurement and production; and direct and coordinate the testing of gliders and related equipment. (R. 7a–8a.)

Decedent did not at any time become a commissioned officer, a warrant officer, or a member of the enlisted personnel in the military service. Prior to his official appointment, decedent completed and filed Civil Service Commission Form No. 57; and he signed the oath of office of an employee of the Federal Government. On the Notification of Personnel Action form, decedent's position was stated as that

of a "Special Consultant." His travel applications and orders were issued from the civilian personnel division of the Office of Chief of Air Staff. (R. 8a.–9a.)

Decedent worked with Major General Ridgway and airborne troops in devising training techniques and tactics for the anticipated use of gliders in combat. Under his direction and supervision the utilization of large gliders for airborne operations was rapidly attained. From July 9 through July 27, 1943, decedent was on duty in the North African Theater of Operations, and personally observed the use of gliders in combat operations in the Sicilian campaign. (R. 9a.)

On September 10, 1943, decedent went to March Field, California, on what General Arnold described as "* * * a military mission under direct orders from Headquarters Army Air Forces, Washington, D. C. * * *". On September 11, 1943, at March Field, while acting in his capacity as special assistant, the decedent participated as an observer in flights testing an experimental transport glider. While the glider, piloted by an Army colonel making a familiarization flight, was being towed in flight by an Army plane piloted by an Army captain, the glider became detached from the tow plane, stalled, and lost altitude. By order of the glider pilot, decedent bailed out. His parachute opened but did not fill, and he sustained injuries resulting in his immediate death. (R. 9a–10a.)

Office of Chief of Air Staff. (R. 8a–9a, 13a–14a.) As for the testimony of General Arnold (R. 7a), it is an explanation of *why* decedent was employed as a civilian. And the fact that decedent's duties were of a type which could have been performed by members of the armed forces is immaterial. The same is true of the duties of test pilots employed by the manufacturers of military aircraft, yet surely no one would contend that such pilots would come within the ambit of Section 939.

2. There is no conflict between the ruling here assailed and decisions of this Court, or of any other court. The decisions invoked by taxpayer, insofar as they have any application here, do not support its position.

In *Commissioner* v. *Connelly,* 338 U. S. 258, the statute involved provided for the exclusion from gross income of $1,500 in compensation received for active service by a commissioned officer. This Court held that the statute only applied where an officer received compensation *qua* officer; and that the taxpayer had received his compensation *qua* civilian employee, and therefore was not entitled to the exclusion. In the case at bar, decedent did not even have the limited military status, legally, that the taxpayer had in the *Connelly* case; he was only a civilian employee of the Government. We submit, therefore, that the *Connelly* decision—far from conflicting with the ruling of the lower courts in the instant case—militates against the broad view of military service urged by taxpayer.

In *Mitchell* v. *Cohen,* 333 U. S. 411, the question was whether members of the Volunteer Port Security Force of the Coast Guard were entitled to Civil Service preference (p. 417) as "ex-servicemen * * * who have served on active duty in any branch of the armed forces of the United States, during any war," within the meaning of the Veterans' Preference Act of 1944. This Court answered the question in the negative. In so holding, the Court recognized (p. 417) that "respondents concededly did perform military service while on intermittent active duty with the Volunteer Port Security Force"; and (p. 418) that "Ex-servicemen are indeed those who have performed military service." But it held that the term, "ex-servicemen," as used in the statute before it, did not extend to all who have performed military service, but only to full time personnel who received military pay. The *Cohen* decision does not purport to define what is meant by "military service," either in general terms or in any particular context. It recognizes that the performance of military service is a *sine qua non* for the qualifications of "ex-servicemen"; notes that this qualification is concededly met in the case before it; and goes on to hold that the Veterans' Preference Act imposes *additional* requirements upon those who would qualify thereunder as "ex-servicemen." This restrictive holding sheds no light whatever upon the meaning of the language, "in active service as a member of the military or naval forces," either in its general signification or in its statutory context in Section 939.